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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	
	)	WT Docket No. 00-130
TeleCorp PCS, Inc., Tritel, Inc. and	)	DA 00-1589
Indus, Inc. for FCC Consent to	)	
Transfer Control of, or Assign,	)	
Broadband PCS and LMDS Licenses	)	

JOINT OPPOSITION OF TELECORP PCS, INC., *et al.* TO THE PETITION TO DENY OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

The Nextel Petition reflects a fatally flawed and illegitimate attempt by Nextel—after being rebuffed in its attempt to obtain designated entity licenses by waiver—to further its agenda of dismantling the Commission's designated entity program. As discussed herein, Nextel repeatedly has sought to unhinge the Commission's designated entity rules to promote its own interests and to acquire more spectrum at the expense of newly-emerging competitors such as TeleCorp. Nextel's Petition seems to be little more than another installment in this campaign.

The designated entity policies were designed to promote entry by companies like TeleCorp in the face of entrenched incumbents like Nextel. In furtherance of this objective, TeleCorp, which generally operates in rural areas, has built out approximately two-thirds of its licensed POPs in a very compressed timeframe and is rapidly adding subscribers and generating airtime. Moreover, as the FCC hoped, TeleCorp's operations have advanced Congressional mandates to increase the role of minorities and women in telecommunications—half of TeleCorp's employees are minority and half are female, including TeleCorp's Chief Operating Officer.

Now, Nextel seeks to undermine the Commission's policies by opposing legitimate transactions by designated entities. Given Nextel's status as a large incumbent carrier that obtained its own operating licenses without any meaningful compensatory payments to the American public, Nextel's self-appointed regulatory enforcement role lacks any credibility. In any event, the Nextel Petition reveals a fundamental misunderstanding of the designated entity policies, the TeleCorp application, and prior Commission precedent. Nextel's selective review of the facts makes much of TeleCorp's current assets, without

recognizing that the eligibility rules relied upon in the applications permit—regardless of assets—transfers of control and assignments that are *pro forma* (such as the transfers of control of the TeleCorp C and F Block licenses) or that are to entities already holding designated entity licenses (such as the transfers of control of the Tritel C and F Block licenses to TeleCorp). Nextel also attempts to cast doubt on the control group structure of TeleCorp's designated entity licensee companies, despite the fact that those structures, which have not undergone any substantive change, were fully disclosed to the Commission and passed upon two years ago.

Moreover, the Nextel Petition does not meet the Commission's threshold procedural requirements for standing or verification. As discussed below, Nextel fails to provide any showing that it is a "party in interest" to this proceeding. Nextel does not even allege any potential injury as a result of grant of the TeleCorp/Tritel applications, much less demonstrate that the "relief" it ultimately seeks to obtain—namely, denial of the TeleCorp/Tritel Applications—will provide "redress" for a cognizable injury to Nextel.

In short, Nextel has failed to raise any legitimate factual or legal issues regarding the manifest public interest benefits of transactions proposed in the applications. Nextel's petition appears to be no more than a transparent effort to delay the proposed transaction or to further Nextel's own self-serving agenda of expropriating for itself spectrum reserved for designated entities. Neither purpose is a legitimate basis for delaying the proposed transactions. The applicants therefore urge the Commission to summarily dismiss Nextel's petition and grant the applications.

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JOINT OPPOSITION OF TELECORP PCS, INC., *et al.* TO THE PETITION TO DENY OF NEXTEL COMMUNICATIONS, INC.

TeleCorp PCS, Inc. ("TeleCorp") and its subsidiaries and affiliates, and Indus, Inc. ("Indus") (collectively, "Applicants")[1] hereby oppose the "Comments On Or, In the Alternative, Petition to Deny of Nextel Communications, Inc."[2] Importantly, only a single party has contested the applications to implement the TeleCorp/Tritel merger and related transactions,[3] and that filing—by Nextel—is limited to unfounded allegations with regard

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[1] The parties to the merger applications are the following: TeleCorp; Gerald Vento and Thomas Sullivan, the controlling principals of TeleCorp; TeleCorp Wireless, Inc. (formerly, TeleCorp PCS, Inc.) ("TWI") and its direct and indirect subsidiaries TeleCorp PCS, L.L.C. ("TPL"), TeleCorp Holding Corp., L.L.C. ("THC"), and TeleCorp LMDS, Inc. ("TLI"); TeleCorp Holding Corp. II, L.L.C. ("THC-II"); Tritel, Inc. ("Tritel") and its direct and indirect subsidiaries; ABC Wireless, Inc. ("ABC"); Indus, Inc. ("Indus"); Black Label Wireless, Inc. ("Black Label"); PolyCell, Inc. ("PolyCell") and its wholly-owned subsidiary Clinton Communications, Inc. ("Clinton"); and AT&T Wireless PCS, LLC ("AWP").

[2] *See* Comments On Or, In the Alternative, Petition to Deny of Nextel Communications, Inc., WT Docket No. 00-130 (filed August 16, 2000) ("Nextel Petition").

[3] "TeleCorp PCS, Inc., Tritel, Inc., And Indus, Inc. Seek FCC Consent To Transfer Control Of, Or Assign, Broadband PCS And LMDS Licenses," *FCC Public Notice* DA No. 00-1589, WT Dkt. No. 00-130 (released July 17, 2000). *See also* Application for the Transfer of Control of AirCom PCS, Inc. from Tritel, Inc. to TeleCorp PCS, Inc., File No. 0000123402 (LEAD), File Nos. 0000117757, 0000117768, 0000117802, 0000123402, 0000123407, 0000123412, 0000123414, 0000123431, 0000123435, 0000123436, 00000123441, 0000123442, 0000117340, 0000117779, 0000123377, 00000123380, 0000123382, 0000117743, 0000117742, and 0000117772, as well as the paper filings captioned

(continued)

to the legitimacy of the proposed C and F Block license transfers and assignments. The Nextel Petition lacks substantive merit, effectively misapplying the designated entity rules to misstated facts. Moreover, the Nextel Petition is procedurally defective and, on this basis alone, should be summarily dismissed. The Commission should not tolerate this misuse of its processes and resources and, accordingly, should dismiss or deny the Nextel Petition as without merit.

I. BACKGROUND

A. TeleCorp Is One Of The Preeminent Designated Entity Success Stories

TeleCorp, by any measure, is one of the Commission's preeminent entrepreneurial success stories. TeleCorp was formed by Gerald Vento and Thomas Sullivan specifically to secure, capitalize, and develop designated entity broadband PCS authorizations. Messrs. Vento and Sullivan, in fact, participated in the original broadband PCS designated entity auction for C Block licenses, but withdrew from bidding when bid prices were driven to levels that did not, in their view, support financing. Undeterred, they entered the D, E and F Block auction and, through that auction, secured a number of F Block licenses that are the basis for TeleCorp's operations today.[4]

(continued)
Application for the *pro forma* assignment of licenses from TeleCorp Holding Corp., Inc. to TeleCorp Holding Corp. II, L.L.C.; Application for the *pro forma* transfer of control of TeleCorp Holding Corp. II, L.L.C. from TeleCorp Wireless, Inc. to TeleCorp PCS, Inc.; Application for the transfer of control of Tritel License—Florida, Inc. from Tritel, Inc. to TeleCorp PCS, Inc.; and Application for the transfer of control of Tritel License—Georgia, Inc. from Tritel, Inc. to TeleCorp PCS, Inc. ("Applications"). *See also* TeleCorp/Tritel Merger Applications Supplemental Exhibit, filed at FCC File No. 0000123402 (filed June 22, 2000) ("Supplement").

[4] *See* Application File Nos. 00867-CW-L-97 through 00873-CW-L-97.

Through hard work and business acumen, Messrs. Vento and Sullivan were able to leverage their ownership of F Block licenses into a brand name marketing arrangement and nationwide roaming agreement, as well as the purchase of additional designated entity and non-designated entity licenses in number of secondary markets and rural areas. In March of 1998, the FCC approved a series of license assignments to TeleCorp and a *pro forma* transfer of control of TeleCorp Holding Corp., Inc. ("THC"),[5] which permitted TeleCorp to close its initial equity and financing arrangements in July of 1998 and emerge as a new wireless competitor.

TeleCorp officially launched its first market—New Orleans, Louisiana—in February of 1999. During the remainder of 1999, TeleCorp initiated service in 26 additional markets, carried 286 million minutes of traffic on its network, and opened 46 corporate stores and 523 retail outlets. TeleCorp has brought 1075 cell sites online since its service inception—almost two per day, every day. By September, 2000, TeleCorp will provide service to approximately two thirds of the total population in its licensed service area. The success of TeleCorp in such a short time, by any objective measure, stands as a testament to the efficacy of the Commission's designated entity policies.

TeleCorp has also been a vast success based on more subjective criteria. As the Commission's designated entity orders have noted, the Commission has been unable to formulate race- or gender-based preferences following *Adarand Constructors.*[6] However, the designated entity rules, which provide economic size-based preferences, are intended

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[5] *See* Application File Nos. 50422-CW-T-98 *et al.*

[6] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

to provide opportunities in furtherance of the Commission's Congressional mandate to promote participation by minorities and women in telecommunications.[7] In this regard, TeleCorp notes that over 50 percent of its workforce is female, including TeleCorp's Chief Operating Officer. Nearly 50 percent of TeleCorp's workforce is minority. This record stands in stark contrast to Nextel, which, according to press reports, is or will be the subject of approximately 300 Equal Employment Opportunity Commission complaints.[8]

In addition, TeleCorp principally serves secondary and rural markets that were not necessarily primary build-out priorities for larger carriers. Although TeleCorp was at best the sixth or seventh carrier licensed for these markets, TeleCorp rolled out its all-digital services in many areas ahead of these other licensees, which were often concentrating their efforts in major metropolitan areas where TeleCorp had no presence. TeleCorp's principal focus in expeditiously rolling out services in its rural markets has significantly improved the quality and cost of digital mobile communications in these lesser served areas. In short, TeleCorp embodies the goals the designated entity rules were designed to foster.

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[7] *See, e.g.*, Amendment Of The Commission's Cellular PCS Cross-Ownership Rule, Implementation Of Sections 3(N) And 332 Of The Communications Act -- Regulatory Treatment Of Mobile Services, 11 FCC Rcd 136 at ¶ 8 (July 18, 1995) (stating "We also indicated that elimination of the race- and gender-based measures from the C block auction rules would be consistent with our duty to implement the Budget Act, since we believe that many designated entities would qualify as small businesses under our rules.")

[8] See "Race Issues Shake Tech World," USA Today at Money, B1 (July 24, 2000).

B. Nextel's Attempt To Further Its Agenda To Dismantle the Designated Entity Rules By Discrediting TeleCorp Should Not Be Tolerated

Nextel's assumption of the mantle of a "protector of the public interest" (much less a protector of the designated entity policies) utterly defies credulity and borders on the reprehensible. Nextel attempted—through the expedient of a waiver—to appropriate designated entity license benefits, despite not qualifying as a designated entity.[9] Upon being rebuffed in its attempts, Nextel has been at the forefront, for at least a year, of efforts to dismantle the designated entity program and allow mega-carriers access to spectrum previously set aside in auctions for qualified entrepreneurs by arguing that the policies were a failure. Nextel's latest tactic appears to be a campaign designed, at best, to disrupt the orderly processing of licensing matters for designated entities by filing a pattern of specious pleadings,[10] or, even worse, retributive measures directed at entrepreneurs seeking to defend the Commission's designated entity policies.

The designated entity policies were intended to provide necessary encouragement to companies like TeleCorp to compete with established mega-carriers like Nextel. While Nextel makes arguments (albeit irrelevant) regarding TeleCorp's assets, Nextel's current market capitalization is approximately $44 billion.[11] Nextel's website boasts that the company offers the "nation's largest guaranteed all-digital network" with service "including 92 of the top 100 U.S. markets and thousands of communities across the

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[9] *See* Nextel Communications, Inc. 8-K (SEC filed Aug. 18, 1999).

[10] *See also* Comments or, in the Alternative, Petition to Deny of Nextel Communications, Inc., FCC File Nos. 0000110639 and 0000110695 (filed May 26, 2000).

[11] *See* http://quote.netscape.com/quote/Quote.tibco?view=quote&symbols=NXTL (Aug. 18, 2000).

country."[12] In fact, Nextel is licensed for 230 million unduplicated POPs, 15.5 times the size of TeleCorp, and Nextel had 4,515,700 subscribers at the end of 1999, almost 32 times more than TeleCorp.[13] Nextel is also an entrenched incumbent, having held many of its core licenses since the early 1980s, whereas TeleCorp was only licensed in the past few years. And, Nextel's core business was founded through waivers of the Commission's rules and on spectrum Nextel was originally granted without ***any*** material payments to the public.

Indeed, the FCC's "upper 200" 800 MHz SMR auction was largely a whitespace auction due to Nextel's incumbent systems—systems for which Nextel paid the U.S. Treasury no more than routine processing fees. In that auction, Nextel won 90 percent of the 10 MHz of "upper 200" 800 MHz SMR spectrum because it was generally purchasing areas around licenses in core areas it already owned.[14] In comparison, the PCS A and B Block auction generated $257,372,806 per MHz of spectrum.[15] Absent the incumbencies, the 90 percent of the 800 MHz band should have generated auction receipts of roughly

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[12] *See* http://www.nextel.com/products/servicecatalog/digitalcellular.shtml (Aug. 18, 2000).

[13] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fourth Report, FCC 99-136 (June 24, 1999) at B-4; Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report, FCC 00-287 (Aug. 18, 2000) at D-2.

[14] 90 percent by auction revenue. The FCC's Auction Fact Sheet for Auction No. 16 states that total revenues were $96,232,060. Nextel's winning bids totaled $88,805,075, or 92.3% of the value of the auctioned whitespace.

[15] Includes payments made by Broadband PCS Pioneer's Preference holders, which were keyed to auction revenue values.

$2.37 billion—but generated only $0.10 billion.[16] Thus, in rough figures, Nextel has been the beneficiary of a $2.27 billion subsidy (a 96% bidding credit) by the American public. Under the circumstances, Nextel's self-declared status as the private attorney general for the designated entity rules must be viewed with cynicism.

II. THE PROPOSED TRANSFEREES/ASSIGNEES ARE QUALIFIED AND WILL REMAIN QUALIFIED UNDER THE COMMISSION'S DESIGNATED ENTITY POLICIES

A. The Nextel Petition Is Based Upon A Misreading of the Application and Fundamental Misunderstandings of the Commission's Designated Entity Rules and Policies

All of the allegations in the Nextel Petition reflect, in various forms, the same common theme that TeleCorp is not, or will not be, qualified to hold designated entity authorizations under the FCC's policies. As discussed below, all of these arguments are based on either a faulty reading of the Applications or a flawed understanding of Commission rules and precedents. None of Nextel's arguments provides any basis for determining that TeleCorp is not fully qualified as a designated entity or for denial of the Applications as submitted.

First, Nextel seizes upon the asset figure of TeleCorp shown in the application and shown in securities filings to imply some "discrepancy" or qualifications issue.[17] Although Nextel cites TeleCorp's statement that the number reported on the FCC Form 603

[16] 92.3 percent of 10 MHz at $257,372,806 per MHz equals $2.37 billion. While Nextel may argue that other incumbents were present in the 800 MHz band, Applicants note that the PCS bands were encumbered by microwave licensees that also required relocation.

[17] Nextel Petition at 2.

"represents [its] net assets at the last time [its] net assets were calculated,"[18] Nextel disingenuously omits the full text of the cited statement, which clearly states "[a]s discussed below, the assets of [TeleCorp] and its affiliates are irrelevant for purposes of the entrepreneurial eligibility of its designated entity subsidiaries under Section 24.839."[19] As noted in Section II.B below, the eligibility rules relied upon in the applications permit—regardless of assets—transfers of control and assignments that are *pro forma* (such as the transfers of control of the TeleCorp C and F Block licenses) or that are to entities already holding designated entity licenses (such as the transfers of control of the Tritel C and F Block licenses to TeleCorp). The only reason *any* figure was provided was because the application could not be filed without placing some figure in that field on the ULS system.

Second, Nextel takes issue with the structure of the control group of TeleCorp's designated entity subsidiaries, and specifically the use of tracking stock. By ignoring statements in the application, Nextel appears to be characterizing the use of tracking stock as some artifice created merely to effectuate the merger. In point of fact, as TeleCorp notes in its application, the tracking stock was "discussed in the *pro forma* transfer of control applications filed at the time [TeleCorp] was originally capitalized,"[20] was used to permit TeleCorp to integrate (and finance) both designated entity and non-designated

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[18] While Nextel seems to make much of TeleCorp's use of the words "net assets," the figure provided in Schedule A, Item 2, was, in fact, "gross assets" at the time calculated. Nextel Petition at 2. TeleCorp also noted, that the number was dated. Contrary to Nextel's assertions, however, due to the way assets are calculated for purposes of the FCC's rules, the asset figure from a securities filing is not the total assets figure that would be used in the application in any event.

[19] Application at 17 n.12.

[20] Supplement at 9.

entity licenses under a common holding company controlled by Messrs. Vento and Sullivan, and is not some new device being presented to the FCC for the first time. To TeleCorp's knowledge, the FCC has passed upon tracking stock in context of the initial capitalization of TeleCorp[21] and the initial capitalization of Tritel,[22] and also passed upon a substantially similar device in the capitalization of the STPCS Joint Venture.[23] And, as shown in the Supplement, jointly Messrs. Vento and Sullivan continue to comply with the current designated entity minimum equity requirement, holding well over 15% of the equity of TeleCorp's designated entity subsidiaries, while institutional investors hold over 10% and other investors hold under 25%.[24]

Third, based on a misreading of the merger documents, Nextel argues that somehow TeleCorp will be ceding negative control to Tritel during the merger process. In fact, as shown in the merger proxy statement,[25] TeleCorp (not TeleCorp and Tritel jointly) has created a new Holding Company that will have two temporary merger subsidiaries, First Merger Sub and Second Merger Sub (shown below as *Figure 1*). TeleCorp will

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[21] *See* Application File Nos. 00867-CW-L-97 through 00873-CW-L-97.

[22] *See, e.g.*, Application File No. 0000003274.

[23] *See, e.g.*, Application File No. 50513-CW-AL-98.

[24] Supplement at 9. TeleCorp notes, in this regard, that under the new "controlling interest" standard adopted for future C Block auctions, no specific equity requirement for controlling investors is mandated, merely *de jure* and *de facto* control, which Messrs. Vento and Sullivan clearly possess.

[25] See TeleCorp Tritel Merger Joint Proxy Statement, SEC Form S-4 at 9.

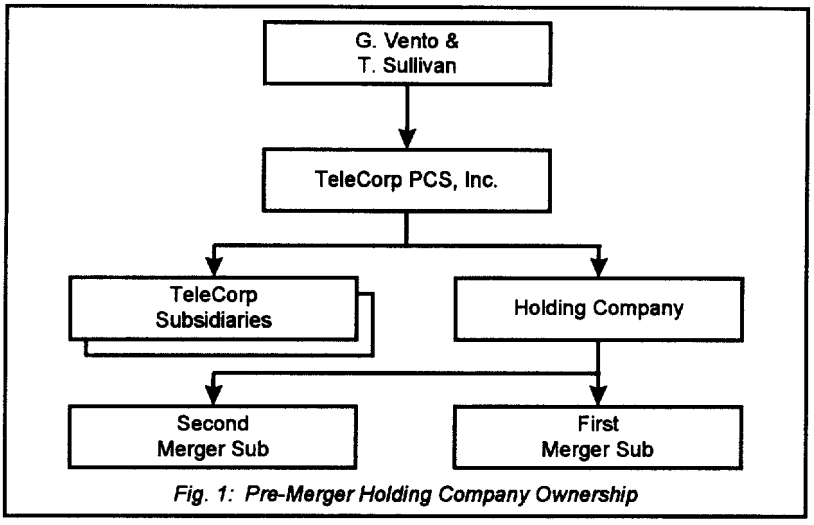

Fig. 1: Pre-Merger Holding Company Ownership

merge with First Merger Sub with TeleCorp as the surviving entity (shown below as *Figure 2*). Only then will Tritel merge with Second Merger Sub, with Tritel as the

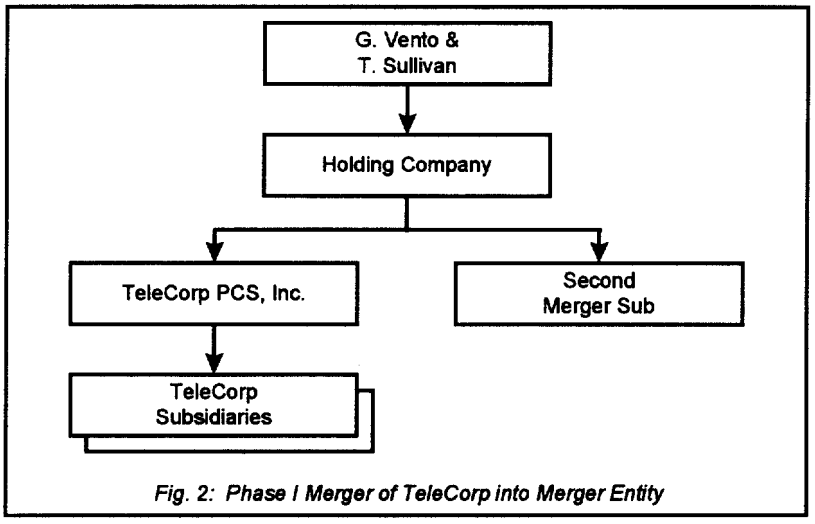

Fig. 2: Phase I Merger of TeleCorp into Merger Entity

surviving entity (shown below as *Figure 3*). Finally, Holding Company and TeleCorp PCS, Inc. will undergo name changes to allow Holding Company to assume the name and trading symbol of TeleCorp PCS, Inc. (shown below as *Figure 4*).

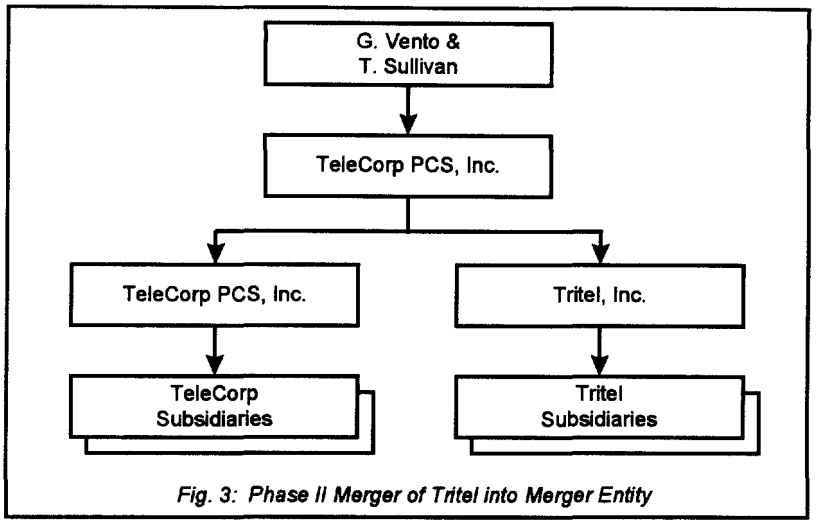

Fig. 3: Phase II Merger of Tritel into Merger Entity

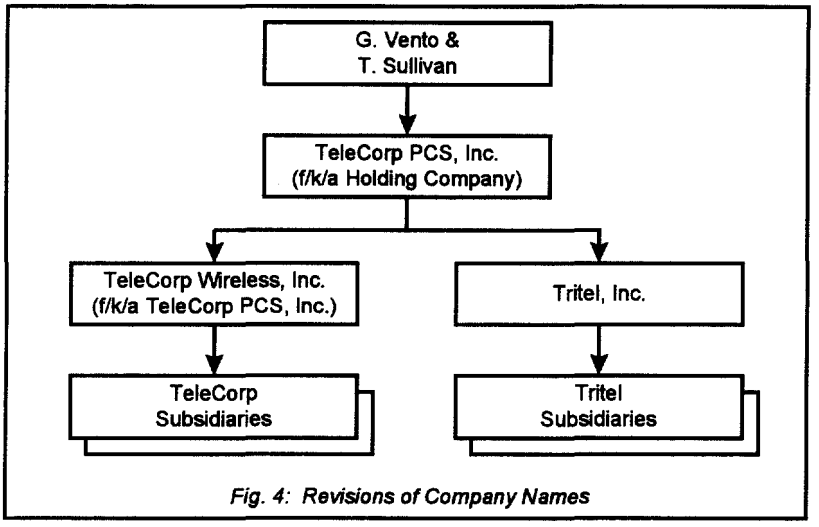

Fig. 4: Revisions of Company Names

At no point will the Holding Company be controlled (negatively or otherwise) by Tritel and, at the same time, hold licenses.[26] Thus, TeleCorp currently is controlled by Messrs. Vento and Sullivan by virtue of the voting preference stock. The initial merger between the Holding Company and TeleCorp will result in Messrs. Vento and Sullivan

[26] In fact, Nextel has misread the Merger Agreement. In an Amendment No. 1 to the Merger Agreement in the S-4 referenced in TeleCorp's application, the Merger Agreement was amended to reflect that the Holding Company to effectuate the merger will be created by TeleCorp PCS, Inc., not jointly by TeleCorp PCS, Inc. and Tritel, Inc. Even if the entity were jointly created by TeleCorp and Tritel, the ownership of the pre-merger entities is irrelevant—Holding Company will not hold licenses until after the first merger with TeleCorp is effected. At that time, by virtue of that merger, Messrs. Vento and Sullivan will assume control of the Holding Company. That control will never be relinquished during the remaining phases of the merger.

holding control of the Holding Company (and therefore TeleCorp) by virtue of the conversion of their TeleCorp voting preference stock into voting preference stock of the Holding Company. Upon the subsequent merger of Tritel into the Second Merger Sub, the control provided through the voting preference shares will remain unimpaired.

Finally, Nextel argues that "grandfathering" provisions of Section 24.839[27] do not apply because TeleCorp has no "showing has been made in the merger application as to the new holding company that is originally to be owned by TeleCorp and Tritel."[28] Once again, Nextel's argument is based on both a faulty factual premise (that Holding Company will be jointly owned by TeleCorp and Tritel) and a the faulty legal conclusion (that the temporary ownership of Holding Company prior to the merger and prior to its control over any licenses is in any way relevant). The Applicants have, however, made the necessary showings, and do so again in Section II.B below, that the designated entity licensees involved in the transactions will remain qualified under the "grandfather" provisions of Section 24.839 to hold designated entity licenses.

B. The Designated Entity Subsidiaries of TeleCorp and Tritel Are Qualified and Will Remain Qualified To Hold the Subject Licenses

As discussed in the Applications and the Supplement, both TeleCorp and Tritel directly or indirectly control designated entity subsidiaries. While the Applications fully describe all "relevant steps to the merger," each designated entity licensee, and proposed licensee, is discussed below in detail. As shown herein, the assets of the combined, post-

[27] 47 C.F.R. §24.839.

[28] Nextel Petition at 7 n.17.

merger entity are irrelevant to the entities' ability to consummate lawfully the proposed transactions.

1. TeleCorp Holding Corp., Inc.

TeleCorp Holding Corp., Inc. ("THC") is the designated entity subsidiary of TeleCorp. THC's economic ownership, through tracking stock, was detailed fully in the Supplement. As a wholly-owned subsidiary of TeleCorp, THC is controlled by virtue of the TeleCorp voting preference stock, which gives Messrs. Vento and Sullivan over 50 percent voting control of TeleCorp, and thereby control over THC. In order to implement the merger in the most expedient manner, THC will undergo a change of form under Delaware law to become a limited liability company (rather than a corporation) known as TeleCorp Holding Corp. II, L.L.C. ("THC-II"). All present classes of THC stock will be duplicated by THC-II membership units with identical equity and voting rights. Thus, the change of form is at most a purely *pro forma* transfer of control.

In addition, at the time TeleCorp merges into the First Merger Sub of the new Holding Company to effectuate the first phase of the merger, THC-II will undergo a second *pro forma* transfer of control. Because the equity and voting rights of each class of existing TeleCorp stock will be exchanged for identical classes of Holding Company stock, and because no new ownership will be introduced, the ownership of THC-II will not be altered, except that a new intermediary corporation will exist between THC-II and the ultimate shareholders. Subsequent changes to the Holding Company to effectuate the Tritel phase of the merger will not alter the voting control over Holding Company.

None of the merger-related changes to the THC licenses raise any designated entity qualifications issues. Section 24.839 of the Commission's rules provides, in pertinent part:

> No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless: . . . [t]he assignment or transfer of control is *pro forma*.[29]

Because all of the corporate restructuring of the THC licenses is *pro forma*, no qualifications issues arise with respect to these authorizations.

In addition to the THC transfers of control, THC-II will also be assigned certain designated entity licenses in related transactions. Specifically, THC-II will be assigned designated entity C and F Block PCS licenses from PolyCell, Inc., Clinton Communications, Inc. and ABC Wireless, Inc. All of these transactions, however, fall squarely within subsection (a)(2) of Section 24.839, which permits, independent of entrepreneurial status, assignments of designated entity licenses to companies that "hold[] other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709 of this part." THC, clearly, met the qualifications criteria as set forth in the company's post-auction D, E and F Block application.[30]

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[29] 47 C.F.R. § 24.839(a)(5).

[30] *See* Application File Nos. 00867-CW-L-97 through 00873-CW-L-97.

2. *TeleCorp LMDS, Inc. ("TLI") and Zephyr Wireless, Inc. ("Zephyr")*

Both TLI and Zephyr are presently wholly-owned designated entity subsidiaries of THC. TLI holds LMDS authorizations and Zephyr is an applicant for 39 GHz authorizations. Because of the change in the form of THC to become THC-II and the addition of another parent entity into the ownership chain resulting from the merger, both TLI and Zephyr will undergo two *pro forma* transfers of control. Notably, however, neither the LMDS licenses held by TLI nor the 39 GHz licenses applied for by Zephyr are subject to an entrepreneurial set-aside, and therefore TeleCorp's total assets are irrelevant for purposes of these licenses. Accordingly, no designated entity issues are raised in the merger context by either of these licensee entities.

3. *Black Label Wireless, Inc. ("Black Label")*

As one of the additional transactions undertaken contemporaneously with the Tritel merger, Black Label seeks to acquire, through merger, the designated entity C Block authorization currently held by Indus, Inc. ("Indus"). Black Label is presently a subsidiary of THC and will be a wholly-owned subsidiary of THC-II, although it will not acquire authorizations until after THC has changed form into THC-II. As a wholly-owned subsidiary of a company that will validly be holding designated entity licenses, no qualifications issues should arise with respect to Black Label.

Specifically, Section 24.839 establishes several grandfathering exemptions to the standard rule requiring applicants to meet the entrepreneurial financial limits. Section 24.839(a) provides, in pertinent part:

> No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless: . . .

> (2) The proposed assignee or transferee . . . holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709 of this part . . . or
>
> (5) The assignment or transfer of control is *pro forma*.[31]

Plainly, THC-II will qualify for grandfathered treatment under subpart (2) of that rule, since THC-II will "hold[] other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709 of this part." In fact, at least four of the THC-II F Block licenses were obtained in the original D, E and F Block auction where THC had no revenues and no assets, and plainly qualified under Section 24.709.[32] Because THC-II qualifies for grandfathered treatment under Section 24.839, a wholly-owned subsidiary of THC-II should also qualify—Black Label could be assigned any of THC-II's authorizations in a purely *pro forma* assignment under subsection (5) of Section 24.839.

4. *The Tritel Designated Entity Companies*

Tritel, through its Tritel C/F Block Holding, Inc. ("Tritel C/F") is the parent of a number of designated entity subsidiaries, including AirCom PCS, Inc.; DigiCall, Inc.; DigiCom, Inc., and QuinCom, Inc. (collectively, the "Tritel DEs"). These entities currently hold their C and F Block PCS licenses in compliance with the FCC's rules using tracking stock issued by Tritel, Inc. in the same way that TeleCorp has issued tracking stock for THC. In the course of the merger, Tritel will merge with, and become the

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[31] 47 C.F.R. § 24.839(a)(2),(5)

[32] *See* Application File Nos. 00867-CW-L-97 through 00873-CW-L-97.

surviving entity of, Second Merger Sub. In that merger, all of the existing Tritel stock classes, including the tracking stock, will be reissued by Holding Company, with the exception of the existing Tritel voting preference stock. While the economic ownership of Tritel C/F will not be modified in a manner any way inconsistent with the designated entity attribution rules, the voting preference stock previously held by the control group for Tritel C/F will be eliminated, and Tritel C/F will be controlled by Messrs. Vento and Sullivan along with all other entities owned by the post-merger holding company.

Control of the Tritel C/F licensees will be changed, but changed in a manner consistent with the designated entity grandfathering rules. As with Black Label's acquisition of the Indus authorization, it is quite clear that THC could acquire any designated entity licenses held by any Tritel C/F company under subsection (a)(2) of Section 24.839. It is further clear that, post-merger, the Tritel DEs are eligible to hold designated entity authorizations because they could be assigned any THC licenses on a *pro forma* basis in compliance with subsection (a)(5) of Section 24.839. Under the circumstances, no designated entity qualifications issues arise with respect to Tritel's existing licenses.

5. *Tritel Licensee—Florida, Inc. ("T-FL") and Tritel Licensee—Georgia, Inc. ("T-GA")*

While they presently hold no designated entity authorizations, T-FL and T-GA should be treated no different than the Tritel DEs. By the time the merger closes, T-FL and T-GA will have been assigned several designated entity F Block authorizations from a third-party. Regardless of the origin of the licenses, however, the regulatory position of these entities will be no different than the Tritel DEs—subsidiaries of Tritel C/F holding

designated entity licenses that will undergo a transfer of control that is effectively grandfathered under Section 24.839.

Thus, the proposed transfers of control and assignments implicated by the TeleCorp/Tritel merger and related transactions do not raise any qualifications issues with respect to entrepreneurial eligibility. These transactions involve a straightforward application of the FCC rules, which clearly were intended to permit entrepreneurial entities to grow and become successful. The Commission should grant the requested transfers of control and assignments and permit the parties to close the contemplated transactions forthwith.

III. THE TELECORP/TRITEL MERGER SHOULD NOT IMPLICATE ANY UNJUST ENRICHMENT PAYMENTS

Nextel argues for the imposition of unjust enrichment penalties on aspects of the TeleCorp/Tritel merger and related transactions. Contrary to Nextel's statements, however, TeleCorp has not "completely ignore[d]" or "fail[ed] to acknowledge" the FCC's decision in *D&E Communications, Inc.* ("*D&E*"). In fact, *D&E* relies mainly on the Commission's prior decision denying Omnipoint ("*Omnipoint*") its requested waiver to permit that company to compete in Auction No. 22 with a "very small business" bidding credit. The Applicants discussed the rationale for the *Omnipoint* decision in considerable detail in the Application, and Nextel has not made any arguments whatsoever in response to the legal arguments tendered by the Applicants.

Nonetheless, to reiterate, unjust enrichment payments should not be applied to the subject applications. First, it is clear that the vast majority of authorizations implicate no unjust enrichment payments under any interpretation of the rules. For example, the C

Block authorizations held by the Tritel DEs and Indus were obtained using only "small business" bidding credits, and the post-merger entity continues to qualify as a small business.[33] Moreover, insofar as the TeleCorp designated entity licenses, the transaction involves only *pro forma* transfers of control where Section 1.2111 is inapplicable. Thus, only in the case of F Block licenses undergoing a non-*pro forma* assignment or transfer of control is unjust enrichment implicated at all.

For those F Block licenses held by the Tritel DEs, PolyCell, or Clinton, the Applicants have also argued that unjust enrichment penalties should not be applied, consistent with *Omnipoint* and *D&E*. Unlike *D&E*, the instant transactions involve companies that qualified for the same level of designated entity benefits at the time of original licensing. And, under the *Fifth MO&O*, "unjust enrichment penalties . . . apply if . . . [the companies] qualified for different [eligibility] provisions ***at the time of licensing***."[34] Moreover, the *Fifth MO&O* continues on to state "under certain circumstances, we will allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for . . . ***small business***

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[33] Indeed, according to the press release accompanying the Commission's recently adopted C and F Block Reauction Order:

> A licensee that won a license in Auction No. 5 or 10 will not be subject to a bidding credit unjust enrichment payment upon transfer and assignment of the license, subject to the FCC's transfer requirements, to an entity not qualifying as a small business.

FCC News Release, "FCC Revises Rules For Upcoming C And F Block Auction: Action Preserves Opportunities For Small Businesses And Promotes The Rapid Deployment Of Wireless Services" (rel. Aug. 25, 2000) at 1.

[34] *Fifth MO&O* at ¶125.

eligibility."[35] By stating "small business eligibility," it is self-evident that the Commission was not referring to entrepreneurial set-aside eligibility, but rather eligibility for bidding credits.[36]

IV. THE FATALLY FLAWED NEXTEL PETITION SHOULD BE SUMMARILY DISMISSED ON STANDING GROUNDS

As a threshold matter, Nextel's petition is facially defective and should be summarily dismissed for failing to satisfy either the statutory or regulatory procedural requirements for petitions to deny.[37] Both Section 309(d)(1) of the Communications Act and Section 1.939 of the Rules, which petitioners cite as the basis for filing their pleading, require "specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity."[38] Entirely omitting any "specific allegations of fact," Nextel merely claims that, because it "provides commercial mobile radio service . . . in numerous markets currently served by either TeleCorp or Tritel, [it] is a party in interest."[39] Further, both the Act and the Rules also require petitioner's

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[35] *Id.* At ¶126. This is also consistent with the Commission's bidding credit repayment rules, which assess interest on bidding penalties from the grant to the original licensee, not from the time a proposed assignee or transferee changed bidding credit status.

[36] The Application also argued that, to the extent the FCC may determine unjust enrichment nominally does apply, "the Applicants believe the application of those rules should be waived," for reasons stated in the Application. *See* Application at 20.

[37] The Parties recognize that the FCC's Public Notice also invited informal public comment on the Applications. Insofar as the Nextel Petition purports on its face to be a petition to deny under Section 309 and seeks denial of the Applications as filed, Nextel must nonetheless demonstrate proper standing.

[38] *See* 47 U.S.C. § 309; *see also* 47 C.F.R. § 1.939(d).

[39] *See* Nextel Petition at 1.

allegations to be supported "by affidavit of a person or persons with personal knowledge thereof."[40] The Nextel Petition is not supported by affidavit.

The Commission has long held that "Section 309(d)(1) of the Act restricts to 'parties in interest' the universe of entities that may raise challenges [through a] petition to deny. . . . Under this portion of the Act, a 'party in interest' must meet essentially the same requirements as those for standing . . . to appeal a Commission decision to a federal court."[41] Because petitioner does not demonstrate any "personal injury" that is "fairly traceable to the challenged action," and there is not "a substantial likelihood that the relief requested will redress the injury claimed,"[42] its petition should be dismissed. The United States Court of Appeals for the District of Columbia Circuit recently dealt with an analogous case involving standing to file a Petition to Deny the assignment of an FCC license. The Court concluded that "petitioners, of course, bear the burden of establishing the three elements of constitutional standing in this court."[43] In its opinion, the Court stated that "assuming that a footnote [claiming standing as a competitor] in petitioner's reply brief sufficiently raises such a theory, we reject it on its merits."[44] The Court's decision was based on the fact that because "petitioner cannot obtain compensation to himself for a past injury, he has failed to show its redressability . . . . [P]etitioners as

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[40] *Id.*

[41] *MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Company, Transferee ("MCI Communications"),* 12 FCC Rcd 7790, 7797 (1997) (intervening citations omitted).

[42] *See MCI Communications* at 7797.

[43] *See Leticia Jaramillo and Joseph Rey, Appellants v. FCC, Appellee,* 162 F.3d 675 (D.C. Cir 1998).

[44] *Id.*

competitors are left with irremediable past injury from allegedly illegal competition . . . ."[45] Similarly, Nextel has failed to show how it has been injured, and how action by the Commission to address its petition will redress any Nextel injury.

As stated above, Nextel fails to detail, much less substantiate, any injury and fails to demonstrate how Nextel has been or will be "personally" harmed by TeleCorp and Tritel.[46] Nextel also fail to demonstrate how its "injury" is "fairly traceable" to Tritel or TeleCorp. The petition also is defective because Nextel fails to establish how any action taken by the Commission to address its petition would "redress" any conceivable "injury." Grant of the relief requested by Nextel in this proceeding would simply foreclose the proposed transaction. Petitioner's status would not change. Because Nextel fails to satisfy *any* (when indeed, it must satisfy *all*) of the prerequisites of standing to file its pleading, the Nextel Petition should be summarily dismissed.

V. CONCLUSION

As discussed above, the Nextel Petition is fatally defective in that the petitioners lack standing to challenge the Applications. Further, the Nextel Petition incorrectly applies the Commission's designated entity rules and misinterprets Commission precedent. The proposed assignees and transferees are in compliance with the Commission's

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[45] *Id.*

[46] *See Cuero Broadcasters, Inc.*, 22 FCC 2d 441 (1970) (The Commission concluded that "[u]nder the present facts, we find that the injury complained of is too speculative in nature to consider Petitioner a party in interest to protest the assignment. No clear connection between a grant of this application and injury to Quick-Tel has been satisfactorily demonstrated. In assignment cases, a party does not have standing sufficient to warrant the filing of a petition to deny *unless it can establish that a grant of the application complained of would result in or be reasonably likely to result in some injury of a direct, tangible or substantial nature*. Further, there must be probable injury of a substantial character, not an injury that is only nominal or speculative.") (citing WGAL Television, Inc., 13 RR 2d 1131 (1968)) (emphasis added).

designated entity rules and each designated entity licensee is fully eligible to hold designated entity authorizations and will remain so post-merger, without implication of the Commission's unjust enrichment penalties. Finally, as demonstrated in the TeleCorp/Tritel Applications, grant of the proposed merger will provide significant public interest benefits.

Because the Nextel Petition is procedurally flawed and devoid of substantive merit, it should be promptly dismissed or denied. The Commission should not indulge Nextel in its filing of a pleading in furtherance of an agenda unrelated to the qualifications of the parties to the transactions. Such pleadings serve no purpose other than to disrupt the business plans of Nextel's competitors, who are fully cognizant of and compliant with Commission regulations both procedurally and substantively. For the foregoing reasons, Applicants respectfully request that the Commission grant the subject Applications,

thereby expediting improved PCS service to the public and encouraging the continued success and competitiveness of its wireless entrepreneurs.

Respectfully submitted,

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August 28, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2000, I caused copies of the foregoing Joint Opposition of TeleCorp PCS, Inc., *et al.* to the Petition to Deny of Nextel Communications, Inc. to be delivered, First Class Mail, postage pre-paid, to the following:

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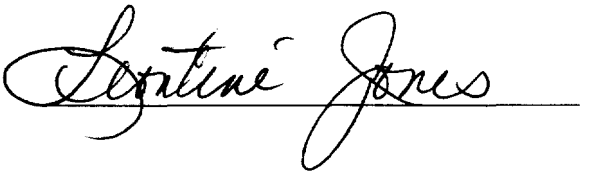

* Indicates service by hand delivery.